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The Legal Challenges of Online Intermediary Platforms

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FOREWORD

New technology – new opportunities – new challenges – new regulation? This is the common line of thought in the 10 contributions in this special issue on online intermediary platforms. The 10 contributions each provide a critical view on how online intermediary platforms fit in the context of the authors' areas of expertise. The contributions cover overarching regulatory models and frameworks along with specific problem areas such as consumer law, labour law and tax law as well as sector specific perspectives within accommodation and finance. Last, but not least, the issue of jurisdiction is also presented.

There is no common legal definition of online intermediary platforms, but the scope of the special issue is primarily online platforms where users register in order to enter into contract with each other. Social platforms and search engines are thus excluded. Despite this delimitation, the scope is still broad enough to cover a variety of platforms with different business structures. Eleven contributions provide various valuable perspectives on these online intermediary platforms and together, the contributions form a comprehensive, though not exhaustive, analysis of legal challenges of the intermediary platforms.

Two common key challenges can be identified across the contributions. The first challenge is categorising the platform and platform users. The contributions reveal that the legal categories in existing legislation do not always fit the parties in the triangular structure of the intermediary platform. As a consequence, it becomes unclear how to apply existing regulation and the parties will not know their legal position. The other challenge identified concerns the striking of balance. On the basis of considerations expressed in existing legislation and expressed policies, the authors reflect on balance on various areas related to regulation of intermediary platforms. In regards to an overall level of choice of regulatory technique, the balance relates to self-regulation vs. state regulation and national vs. regional or international regulation. There is also the issue of balance between innovation and preserving status quo, and in addition, the balance between the many specific considerations, such as protection of the weaker party and social security vs. the possibility of running a business for the platform, freedom of contract etc. Most of the specific legal challenges revealed in the contributions relate to a disturbance or a disruption of the existing notion of balance, and the provided suggestions for solutions or critical reflection on existing proposals for solutions thus aims at restoring this balance within the new business structure of platforms.

The first two contributions focus on two different levels of regulatory techniques. Andrej Savin analyses the EU regulative approach to the area, arguing that there has been a shift in the target for regulation from services and networks to platforms. This shift is partly caused by a change in perception of enabling the flow of digital services to a need for constraining e.g. illegal content. Savin calls for an integrated approach to

platforms of all layers of the platform including the wire, the content and the audio-video layer, based on an overarching platform policy. Vibe Garf Ulfbeck, Ole Hansen and Clement Salung Pedersen discuss the other end of the regulatory scale, as they discuss the consequences of self-regulation/private governance especially related to consumer protection and non-discrimination. The contribution is based on a case study of Airbnb. The authors show that Airbnb includes public values into their policy but argue that doing so is not as effective as statutory provisions for reasons such as difference in enforcement approach and the network effect of loyalty.

In the third contribution, Marie Jull Sørensen explores how four legal frames within Danish consumer contract law may apply to the intermediary platforms. In analysing the four legal frames, the focus is on the role of the platform in regards to the contract between the two users (parties to the main contract). Sørensen discusses how provisions from the liability regime of Draft Model Rules on Online Intermediary Platforms might help align the discrepancies between risk and control revealed in some of the four legal frameworks.

The fourth and fifth contributions address the issue of protection of the platform worker. From a Swedish standpoint, Annamaria Westregård considers when the Nordic labour model applies on platform workers. Westregård presents the Swedish concept of *dependent contractor* as a relevant category for the platform worker. She discusses the need for connection between regulation of labour law, social security, collective agreements and tax law but warns against a too intrusive approach from legislators into the labour model. From a Danish standpoint, Christian Højer Schjøler and Natalie Videbæk Munkholm provide a perspective on collective agreements, especially regarding their limitations in relation to competition law. Schjøler and Munkholm discuss who is covered by the Danish labour model and present the first collective agreement for platform work which is being trialled for a one-year period. A novel aspect of the agreement is the fact that unlike other collective agreements the platform workers are free to choose whether they want to join the agreement or not.

In the sixth contribution, Peter Koerver Schmidt and Louise Fjord Kjærsgaard argue that existing tax law is not suited for cross border platforms, as the law does not appropriately align the location in which profits are taxed (permanent establishment) and the location in which value is created (user-jurisdiction). Schmidt and Kjærsgaard focus on taxation of the platform in the user-jurisdiction and discuss if the value added by the user somehow can be taxed. The concepts of barter transactions and payment of royalties are also discussed in search for alternative ways to tax what might be seen as payments from the user to the platform.

In the seventh contribution, Robert Einefors presents a commercial model for opening the Swedish rental housing market to platforms such

as Airbnb. Einefors argues that restrictive Swedish housing regulation has prevented people from subletting partly because the tenants have to ask the landlord for permission to sublet. The suggested model gives the landlord an economic incentive to grant this permission by making it possible for landlords to charge an extra fee. In addition, the tenants can sublet to a higher price. The model requires that certain criteria are met in order to apply with existing law.

The eight contribution by Elif Härkönen presents equity crowd funding as disruption of the traditional market for business financing and shows that there are different regulatory approaches in the Nordic countries. Härkönen argues that there is a need for harmonisation and that especially countries with smaller populations will benefit from an extended volume of potential lenders.

In the ninth contribution, Tanja Jørgensen focusses on funding of private persons through peer-to-peer lending and argues that the peer-to-peer service providers in these areas fill a gap partly caused by the financial crisis which resulted in restraints by the banks to lend out money. Based on her analysis, Jørgensen calls for a need for a single European regulatory framework on crowdfunding with specific focus on consumer protection.

In the final contribution, Asger Lund-Sørensen discusses the application of jurisdiction clauses. Lund-Sørensen argues that allowing to choose the jurisdiction creates predictability. However, in the case of platforms, he questions the autonomy of the user, as the terms are made on a take-it-or-leave-it basis. In regards to jurisdiction clauses, Lund-Sørensen shows that the classification of the users is important as both consumers and employees are granted protection in international private law regulation.

As shown, this special issue covers a large number of topics related to online intermediary platforms and I thank the contributors and Nordic Journal of Commercial Law for making this special issue possible. It is my hope that this publication will inspire and qualify the development of this important area of law and business.

/ Marie Jull Sørensen